89-1051

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LEWIS POWELL, etc., et al.,

Petitioners,

vs.

WESTERN ILLINOIS ELECTRIC COOPERATIVE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

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QUESTION PRESENTED FOR REVIEW

Whether a state court denies due process by a procedure that eliminates adversarial interests before a hearing on the merits.

LIST OF PARTIES

Petitioners

LEWIS POWELL, individually and as member of Menard Electric Cooperative; JOHN B. HENRY, individually and as member of Spoon River Electric Cooperative; TERRY POST, individually and as member of Adams Electric Cooperative; DR. GENE SHULTZ, individually and as member of MJM Electric Cooperative; RUBY WATRET, individually and as member of Illinois Rural Electric Cooperative; FRANCIS F. WHITE, individually and as member of Rural Electric Convenience Cooperative; JOHN R. GLIDDEN, individually and as member of Western Illinois Electric Cooperative, said cooperatives being members of Western Illinois Power Co., Inc.; and DAVID COLLINS, individually and as member of Coles-Moultrie Electric Cooperative; KEN BAEBLER, individually and as member of Monroe County Electric Cooperative; TOM DEWITT, individually and as member of Edgar Electric Cooperative; LEO GOGOLEK, individually and as member of Tri-County Electric Cooperative; CHARLES GOODALL, individually and as member of Illini Electric Cooperative; GLEN KRIDER, individually and as member of Southwestern Electric Cooperative; R.O. JEWELL, individually and as member of Illinois Valley Electric Cooperative; JEFFREY R. KINCAID, individually and as member of Farmers Mutual Electric Company; EBEN IRISH, individually and as member of McDonough Power Cooperative; MAURICE MOORLEGHEN, individually and as member of Clinton County Electric Cooperative; MRS. DALE SNYDER, individually and as member of Clay Electric Cooperative; TOM SUMMERS, individually and as member of Shelby Electric Cooperative; GLELA SHARP, individually and as member of Eastern Illinois Power Cooperative; DEANE WEIHMEIR, individually and as member of Corn Belt Electric Cooperative; LOUIS ZURLIENE, individually and as member of Wayne-White County Electric Cooperative, said cooperatives being members of Soyland Power Cooperatives, Inc.; and

LEWIS POWELL, JOHN B. HENRY, TERRY POST, DR. GENE SHULTZ, RUBY WATRET, FRANCIS F. WHITE, JOHN R. GLIDDEN, DAVID COLLINS, KEN BAEBLER, TOM DEWITT, LEO GOGOLEK, CHARLES GOODALL, GLEN KRIDER, R.O. JEWELL, JEFFREY R. KINCAID, EBEN IRISH, MAURICE MOORLEGHEN, MRS. DALE SNYDER, TOM SUMMERS, GLELA SHARP, DEANE WEIHMEIR, LOUIS ZURLIENE, as Representatives of a Class of All Customers of Illinois Power Company, Inc., who are obligated to Pay Rates Charged Through the Clinton Nuclear Station.

Respondents

WESTERN ILLINOIS ELECTRIC COOPERATIVE, ADAMS ELECTRIC COOPERATIVE, SPOON RIVER ELECTRIC COOPERATIVE, MENARD ELECTRIC COOPERATIVE, ILLINOIS RURAL ELECTRIC COOPERATIVE, MJM ELECTRIC COOPERATIVE, RURAL ELECTRIC CONVENIENCE COOPERATIVE, CLAY ELECTRIC COOPERATIVE, CLINTON COUNTY ELECTRIC COOPERATIVE, COLES-MOULTRIE ELECTRIC COOPERATIVE, CORN BELT ELECTRIC COOPERATIVE, EASTERN ILLINOIS POWER COOPERATIVE; EDGAR ELECTRIC COOPERATIVE, FARMERS MUTUAL ELECTRIC COMPANY, ILLINI ELECTRIC COOPERATIVE, ILLINOIS VALLEY ELECTRIC COOPERATIVE, McDONOUGH POWER COOPERATIVE, MONROE COUNTY ELECTRIC COOPERATIVE, SHELBY ELECTRIC COOPERATIVE, SOUTHWESTERN ELECTRIC COOPERATIVE, TRI-COUNTY ELECTRIC COOPERATIVE, WAYNE-WHITE COUNTY ELECTRIC COOPERATIVE, WESTERN ILLINOIS POWER COOPERATIVE, INC., and SOYLAND POWER COOPERATIVE, INC.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

Powell, et al. prays that a Writ of Certiorari issue to review the judgment of the Illinois Supreme Court entered on October 5, 1989 denying an appeal as a matter of right raising issues under the Constitution of the United States arising for the first time as a result of action of the Illinois Appellate Court.

OPINION BELOW

Powell, et al. v. Western Illinois Electric Cooperative, et al., 180 Ill.App.3d 581, 129 Ill.Dec. 547, 536 N.E.2d 231 (4th Dist. 1989); also see Appendix A hereto.

JURISDICTION

The Opinion of the Fourth District Appellate Court was issued on March 17, 1989. Appeal as a matter of right to the Illinois Supreme Court was denied on October 5, 1989. A stay of mandate to allow filing of this Petition for Certiorari was granted on October 27, 1989. This Court's jurisdiction is invoked pursuant to Supremé Court Rule 17.1(c) and 28 U.S.C. §1257(a).

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

United States Constitution, Fourteenth Amendment

Amendment XIV

No State shall . . . deprive any person of . . . property, without due process of law; . . .

Rule 317 of the Supreme Court of Illinois

Rule 317. Appeals from the Appellate Court to the Supreme Court as of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court.

STATEMENT OF THE CASE

Stage Of Proceedings Where Federal Issue Was Raised

Illinois Supreme Court Rule 317 provides where issues under the United States Constitution arise ". . . for the first time and as a result of the action of the Appellate Court" appeal is a matter of right. In reliance upon that provision, an appeal was filed with the Illinois Supreme Court asserting as follows:

> A. *Appeal As Of Right*
>
> I. IN A CASE OF "FIRST IMPRESSION", THE APPELLATE COURT DENIES DUE PROCESS BY CONDUCTING A SUMMARY HEARING TO REALIGN PARTIES AND DISMISS PLAINTIFFS' DEPRIVATIVE ACTION BEFORE A FULL AND FAIR HEARING ON THE MERITS.
>
> . . .
>
> Realignment should never be used to deny an interested party's right to participate in a hearing which may deny constitutionally protected property rights.
>
> > Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971).
> >
> > *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430, 102 S.Ct. 1148, 71 L.Ed.2d 265, 274 (1982).

Petition For Appeal As A Matter Of Right Or, In The Alternative Petition For Leave To Appeal, pp. 2, 9-10.

An appeal as a matter of right was denied in this case and the intermediate reviewing court remains the Illinois court of last resort.

In a case it describes as "first impression", an Illinois reviewing court, *for the first time*, approved procedural realignment to dismiss parties whose participation was essential to preserve the adversary nature of proceedings and necessary to insure due process. In sanctioning such a procedure, the Illinois court ignored decisions of this Court requiring a "collision of interests."

The Parties

The Plaintiffs are members/owners of not-for-profit electrical cooperatives distributing electrical power to rural consumers. Each distribution cooperative purchases power produced by other utilities. These distribution cooperatives are either members of Soyland Power Cooperative (Soyland) or Western Illinois Power Cooperative (WIPCO). WIPCO and Soyland are known as generation and transmission cooperatives and service 170,000 member/owners.

Regulatory Agencies

Rural cooperatives are not regulated by the Illinois Commerce Commission (ICC). Therefore, consumer rate regulation provided by the ICC to public utility ratepayers is not available to cooperative member/owners. (Trans. Vol. III, p. 23, Gant testimony; Pl. Ex. 2, pp. 35-36) The co-ops are regulated by the Federal Energy Regulatory Commission (FERC). However, FERC does not regulate rates. The Rural Electrification Administration (REA) exercises financial control over the level of debt of the co-ops, but does not regulate rates or provide consumer protection. (Pl. Ex. 23)

Illinois Power: The Clinton Nuclear Power Station

In 1975, Illinois Power Company, Inc. (Illinois Power) began construction of the Clinton Nuclear Power Station (Clinton). In August of 1976, WIPCO and Soyland signed an "Ownership Participation Agreement" (OPA) with Illinois Power. (Pl. Ex. 30A – CC1; R.C99) This agreement provided that Soyland purchase 10.5% and WIPCO purchase 9.5% of Clinton. The original cost of the plant was estimated to be $400 million, but the OPA provided that WIPCO and Soyland would be obligated for whatever amount of capital was required according to their proportionate ownership. (Pl. Ex. 30A – CC1, p. 13; Article IV, 4.2; R.C113) There was no cap on the liability. The OPA also granted Illinois Power sole control over the design, construction and operation of the plant and designated Illinois Power as the cooperatives' agent in presenting testimony to regulatory agencies and lending bodies. (Pl. Ex. 30A – CC1, p. 15; Article V, 5.1; R.C115)

To finance this project, Soyland obtained loan guarantees of $328 million from the REA, and WIPCO obtained loan guarantees of $286.8 million. (Pl. Ex. 23, Appendix I:16) These loans must be repaid through electric rates charged to member/owners.

Notice Of Mismanagement

In 1978, a group of co-op member/owners prepared a document entitled "The Prairie Alliance White Paper" chronicling waste and negligence by Illinois Power at Clinton and forecasting the long term financial damage to WIPCO and Soyland. (Pl. Ex. 42) By 1979, all officers and directors of WIPCO and Soyland were aware of large cost overruns at Clinton. (Trans. Vol. III, p. 17, Gant testimony; pp. 49-51, Mohrman testimony; p. 165, Beatty testi-

mony; p. 171, Champion testimony).[1] Between 1979 and 1985, local newspapers throughout the state carried repeated stories of mismanagement at Clinton. (Pl. Ex. 29I, 29II, 29III) Media attention climaxed in 1980 when CBS televised a program on "60 Minutes": "Who Pays? . . . You Do", dramatizing mismanagement and cost overruns at the Clinton plant. (Pl. Ex. 21)

Statute Of Limitations And Release

On October 5, 1984, WIPCO and Soyland abandoned an agreement with Illinois Power tolling applicable statutes of limitation and executed a "mutual release". (Pl. Ex. 3-63, p. 6; Pl. Ex. 4-87, p. 3; Pl. Ex. 11) The fact that Illinois Power and WIPCO and Soyland also released Illinois Power from claims of mismanagement was not communicated to the member/owners of the local co-ops. (Trans. Vol. V, pp. 24-25, Smith testimony; p. 119, Powell testimony) Agreements capping co-op investment in Clinton were submitted to the Federal Energy Regulation Commission (FERC) for a fairness hearing. (Trans. Vol. III, p. 64, Gant testimony) However, the 1984 "mutual release" was an essential part of those agreements and was neither submitted for FERC approval nor made public. (Trans. Vol. III, pp. 146-147, Gant testimony; Trans. Vol. V, pp. 24-25, 119)

Less than a year after Illinois Power was secretly released from liability, an independent study commissioned by the ICC was made public. (Pl. Ex. 5A-E) A prelimi-

[1] The Illinois Appellate Court's Opinion suggests at page 5 that management first began to investigate the basis for legal action against Illinois Power after an independent Touche-Ross Audit was made public by the Illinois Commerce Commission in 1985.

nary five volume report prepared by Touche-Ross detailed the chronology of Clinton cost overruns and concluded that as much as $463 million had already been misspent on the uncompleted Clinton plant. (Pl. Ex. 5A, pp. 1-36) Immediately thereafter, co-op management publicly joined with Illinois Power to deny these findings. In January of 1986, Illinois Power called a press conference participated in by both Soyland and WIPCO and criticized Touche-Ross findings of mismanagement. (Pl. Ex. 19)

Pleadings

On September 26, 1986, member/owners of twenty-two distribution cooperatives that comprise WIPCO and Soyland filed this derivative action against Illinois Power. Illinois Power, together with WIPCO and Soyland, filed motions to dismiss based upon standing. (R.C95, 217, 224, 285) WIPCO and Soyland's motions to dismiss were argued and Illinois Power's motion was deferred. The trial court ruled that Plaintiffs had standing to sue; however, the complaint was dismissed with leave to amend and plead with specificity the demands made upon WIPCO and Soyland to pursue an action against Illinois Power. (R.C2528, Docket Entry)

Plaintiffs filed a verified amended complaint (R.C751) WIPCO and Soyland elected not to challenge the legal sufficiency of Plaintiffs' verified factual allegations and instead responded with a "*Motion of Nominal Defendants Soyland and WIPCO to be Realigned as Plaintiffs and to Dismiss the Derivative Counts of the Powell Plaintiffs.*" (R.C952) In their motion to "realign", WIPCO and Soyland sought exclusive control over the suit by dismissing derivative Plaintiffs as parties prior to a hearing on the merits.

Several distribution co-ops, including Rural Electric Convenience Cooperative, Southwestern Electric Cooperative, Western Illinois Cooperative and Coles-Moultrie Electric Cooperative, objected to WIPCO and Soyland assuming exclusive control over this suit arguing that the directors and officers of WIPCO and Soyland were opposed to the claim against Illinois Power, and therefore, had a conflict of interest. (R.C1533, 1528, 1543, 1364)

The trial court ruled that Plaintiffs had the burden to establish that the current officers and directors of WIPCO and Soyland would not prosecute the corporate claim against Illinois Power with "good faith and independence". In addition, the trial court refused *in camera* review of corporate minutes, but nevertheless, ruled that redacted portions of those minutes were subject to management's claim of corporate attorney-client privilege. Therefore, relevant corporate minutes were never examined by the Plaintiffs and never considered by the trial court. (Trans. Vol. II, p. 86; Vol. VI, pp. 157-160, Ward testimony; Vol. VII, p. 26) At the close of the hearing, the court granted the co-op's motion to realign corporate management as the sole plaintiffs and all derivative claims were dismissed before a hearing on the merits.

REASONS FOR ALLOWANCE OF THE WRIT

I.

IN A CASE OF "FIRST IMPRESSION", THE ILLINOIS COURT DENIES DUE PROCESS BY DISMISSING PROPER PARTIES BEFORE A HEARING ON THE MERITS.

A. Participation In A Hearing On The Merits.

The Plaintiffs, as member/owners of not-for-profit corporations, are burdened with hundreds of millions of dollars of waste and mismanagement that must be borne in the form of electric rate increases. Plaintiffs filed this derivative action to prevent accrual of further statute of limitation and *laches* defenses. In an opinion described by the Illinois Appellate Court as "first impression", a rule is announced which permits "realignment" of parties in order to dismiss member/owners who forced the corporate claim before court. The only novel issue in this case is the Illinois court's disregard of principles established by this Court to insure due process.

Realignment is not a judicial tool to deny an interested party's right to participate in a hearing which adjudicates constitutionally protected property rights.

> Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971).
>
> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430, 102 S.Ct. 1148, 71 L.Ed.2d 265, 274 (1982).

B. Management Records And Minutes.

Both the trial court and appellate court were asked to examine management's unilateral redaction of corporate minutes. This request was made in order to obtain a ruling on management's claim of corporate attorney-client privilege, *not invite an ex parte finding on the legal significance of management's prior conduct.* The trial court refused to examine the redacted minutes. (Trans. Vol. VI, pp. 157-160) The Illinois Appellate Court then refused to allow examination of redacted minutes on appeal. (Order of Appellate Court, September 27, 1988, Appendix B) Instead, the Illinois Appellate Court reviewed the redacted minutes *ex parte* and summarily found ". . . no information of value exists relating to determining the issue of good faith." (App. 13)

Denial of member/owner access to its corporate minutes is a further denial of due process. Such an *ex parte* procedure has previously been stricken down as violative of due process.

> Reliance upon evidence considered *in camera* as the basis for decision is fundamentally inimical to due process. (citations omitted) Only the most exceptional circumstances can justify determinations based upon documents which interested parties may not examine.
>
> * * *
>
> In light of the limited review available in state courts . . . (citations omitted) such *in camera* practice prevented any meaningful adjudication and violated the Due Process Clause of the Fourteenth Amendment.
>
> *Briscoe v. Kusper*, 435 F.2d 1046, 1057 (7th Cir. 1970).

This procedure not only denies due process in this case, but also denies due process prospectively to member/owners by refusing information revealing how management is operating a business they own. *Garner v. Wolfin-*

barger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971).

C. Plaintiffs' Verified Pleadings Remain Unanswered And Leave No Issue Of Fact To Be Resolved As To Alignment Of Real Interests Until A Hearing On The Merits.

The Plaintiffs' pleadings are verified and absent a verified answer must be taken as true. Prior United States Supreme Court decisions clearly instruct that the allegations of the pleadings *alone* should define the issues and determine proper alignment of the parties, *until a hearing on the merits.* This Court's decisions also hold that the business judgment rule has no application where directors are antagonistic toward pursuit of a valid corporate claim.

> The gist of the findings of the District Court is that since there was no fraud on the part of the directors in making the contracts but only an exercise of independent business judgment, the management was not antagonistic to the financial interests of the corporation. *That is an issue that goes to the merits*, not to the question of jurisdiction. There will, of course, be antagonism between the stockholder and the management where the dominant officers and directors are guilty of fraud or misdeeds. *But wrongdoing in that sense is not the sole measure of antagonism. There is antagonism whenever the management is aligned against the stockholder and defends a course of conduct which he attacks.*
>
> * * *
>
> *It seems to us that the proper course is not to try out the issues presented by the charges of wrongdoing but to determine the issue of antagonism on the face of the pleadings and by the nature of the controversy.* The bill and answer normally determine whether the management is antagonistic to the stockholder, as *Cen-*

> *tral R. Co. v. Mills*, 113 US 249, 28 L ed 949, 5 S Ct 456, and *Doctor v. Harrington*, (U.S.) supra, indicate. The management may refuse or fail to act for any number of reasons. Fraud may be one; the reluctance to take action against a close business associate may be another; honest belief in the wisdom of the course of action which management has approved may be still another; and so on.
>
> *Smith v. Sperling*, 354 U.S. 91, 95, 96, 77 S.Ct. 1112, 1 L.Ed.2d 1205, 1210, 1211 (1957) (emphasis added).

The management of WIPCO and Soyland were clearly "antagonistic" toward any claim against Illinois Power, their managing partner in Clinton. This "antagonism" arose from the fact that proof of mismanagement against Illinois Power will necessarily involve proof of *ultra vires* conduct and breach of management's fiduciary duties to monitor Clinton and take timely legal action. (See pp. 14-17 herein)

Since derivative actions were created by federal courts of equity over one hundred years ago, this Court has repeatedly set guidelines which have been applied by both state and federal courts. Alignment of the corporate entity is determined by whether "antagonism" to the suit exists among its corporate management.

> It was certainly natural enough that a stockholder should seek more earnest representatives, and consider that the directors "occupied," to use the language of *Dodge v. Woolsey*, "antagonistic grounds in respect to the controversy" as to him. The attitude of the directors need not be sinister. It may be sincere. It was so in *Chicago v. Mills*, 204 U.S. 321, 51 L.ed 504, 27 Sup.Ct.Rep. 286, and *Ex parte Young*, 209 U.S. 123, 52 L.ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup.Ct.Rep. 441, and other cases. In this case it was certainly determined. It continued until after this suit was brought.

Delaware & Hudson Company v. Albany & Susquehanna Railroad Company, et al., 213 U.S. 435, 451, 29 S.Ct. 540, 53 L.Ed. 862, 868 (1909).

The Illinois court dismisses precedent of this Court as ". . . a string of federal cases". (App. 7) The only rationale offered to distinguish these cases was that this Court considered realignment in the context of federal diversity. However, all of the ". . . string of federal cases" are corporate derivative suits and outline this Court's guidelines to align parties according to their *real*, rather than nominal interests.

Alignment according to real interests is essential to present a "collision of interests" and thereby preserve a true adversary system. Under the newly announced Illinois rule, the parties bringing this action are not only "realigned", they are dismissed before a hearing on the merits of a claim they alone were willing to force before the Illinois courts.

D. The Business Judgment Rule Has No Application To *Ultra Vires* Acts.

The Illinois court suggests that business judgment justifies a ten year delay and secret release of Illinois Power. (App. 10) The Opinion concludes that the business decisions were complicated ". . . possibly, beyond the actual ability of either plaintiffs or the management and directors of WIPCO and Soyland." (App. 5)

In the words of WIPCO President, Robert Gant, the decision to take over this lawsuit was prompted by the management's realization that it could no longer prevent members/owners from pursuing a corporate derivative claim against Illinois Power. It was only *after* motions to dismiss Plaintiffs' derivative action failed that management

began its effort to pre-empt this claim. As pointed out by WIPCO President, Robert Gant, it was suddenly time for management to take over the suit.

> At our cooperative we got to discussing this, and our attorney, Mr. Bonjean, and myself, and pointed out to the directors that this suit was going to move forward whether or no (sic) and it was the feeling of our board that we should make a demand on WIPCO to go ahead with the suit.
>
> (Pl. Ex. 2, p. 214, Gant testimony; see also Trans. Vol. V, pp. 18-19, Smith testimony)

The fact that management purports to change its mind and requests to be "realigned" as a plaintiff is not a recognized basis to dismiss derivative Plaintiffs and deny them the right to participate in a hearing on the merits.

The business judgment rule is not a defense available to fiduciaries that are guilty of *ultra vires* acts. Derivative actions were created to protect shareholders from the *ultra vires* acts of management. Over one hundred years ago, this Court recognized *ultra vires* as an example of when a derivative action should be pursued. *Hawes v. Contra Costa Water Company*, 104 U.S. 450, 460, 26 L. Ed. 827, 832 (1882).

E. Rescission Must Be Considered As A Remedy.

Plaintiffs assert that rescission of the original "all power" contracts entered into with Illinois Power regarding Clinton is an appropriate remedy. Conversely, WIPCO and Soyland oppose rescission of these agreements. (R. C1431)

The remedy of rescission was recently recognized in the Vermont Supreme Court case of *Vermont Dept. of Public Service v. Mass. Mun. Elec. Co.*, 558 A.2d 215 (Vt. 1988).

In a strikingly similar case, an electrical cooperative challenged the enforceability of contracts for the Seabrook Nuclear Station (Seabrook). The Seabrook contracts were similar because *they delegated all authority over the plant project* to Massachusetts Municipal Wholesale Electric Company (MMWEC). The Vermont co-ops were also required to pay their proportionate share of MMWEC's cost relating to the project while MMWEC retained the power to fix the level of these shares. The court found that these "hell or high water" contracts were an impermissible delegation of corporate authority and void as *ultra vires*.

> Because these agreements would have operated to restrict the freedom of the trustees to manage corporate affairs, they are illegal and void.
>
> *Vermont Dept. of Public Service, supra* at p. 225.

Given the similarities between the Illinois Power contracts and those voided in the Vermont case, it is clearly in the best interest of the co-ops and their members to place the remedy of rescission before the court. Understandably, present management refused to seek rescission. Rescission based upon *ultra vires* requires management to recognize its continuous abdication of fiduciary duty. Officers and directors are personally liable for any injury caused by *ultra vires* acts under Illinois law. (*Melish v. Vogel*, 35 Ill.App.3d 125, 343 N.E.2d 17 (1st Dist. 1975); *Ill.Rev.Stat.*, Ch. 32 §103.15).

During this appeal, Illinois Power asserted the statute of limitation in addition to the 1984 "mutual release" as defenses against WIPCO and Soyland. (Appendix C and D) Co-op management is caught on the horns of its own dilemma by contending that its ten year delay and the formal release of Illinois Power were both based upon "business judgment." Co-op management cannot argue "business judgment" to avoid either the statute of limita-

tion or its release of Illinois Power. Co-op management must acknowledge its *ultra vires* acts and argue they are not binding on the cooperative and its members/owners. *Management will never admit ultra vires because of its obvious conflict.* By way of comparison, an attorney could not waste assets or allow a statute of limitation to bar a meritorious claim and then assert "business judgment". The Illinois courts cannot defer to a naked "business judgment" excuse for management's inaction which is also used by Illinois Power to defeat the corporate claim—especially where management attempts to pass on hundreds of millions of dollars of mismanagement to member/owners toward whom they owe a duty of faithful service.

Management's failure to seek rescission based upon *ultra vires* constitutes antagonism on its face.

> Whenever the management refuses to take action to undo a business transaction or whenever, as in this case, it so solidly approves it that *any demand to rescind would be futile, antagonism* is evident . . . This is a practical not a mechanical determination *and is resolved by the pleadings and the nature of the dispute.*
>
> *Smith v. Sperling*, 354 U.S. 91, 97, 77 S.Ct. 1112, 1116, 1 L.Ed.2d 1205, 1211 (1957).

The remedy of rescission will never be requested by present management, and therefore, never considered by the Illinois courts. Instead, further compromise of the rights of co-op ownership is threatened in non-adversarial proceedings. Consider the words of counsel for Illinois Power prior to this appeal:

> MR. LUNDY: The impact would be, your Honor, that if the Powell plaintiffs appeal we would ask the court to delay any further litigation in response to the Soyland/WIPCO complaint until that appeal is resolved.

> It could have other implications, I don't know.
>
> *It may be that settlement discussions may occur—*
>
> THE COURT: Oh, no.
>
> MR. LUNDY: —once the order that—dismissing—.
>
> THE COURT: The court will take judicial notice of that fact, that there will be no negotiations.
>
> * * *
>
> MR. LUNDY: I'm talking about, your Honor, between Illinois Power and the cooperatives *if it becomes known that the Powell plaintiffs are once and for all out of this case and that that order is final . . .*
>
> (Trans. Vol. VIII, pp. 43-44) (emphasis added).

Instead of "collision of interests", the spectre of "collusion of interests" not only threatens the adversary process, but also threatens unrepresented ownership interests. Such a rule, *adopted as a case of "first impression" in Illinois*, denied due process under the Fourteenth Amendment of the United States Constitution.

F. The Illinois Court Continues To Refuse Judicial Notice Of Material Facts Occurring During This Appeal.

From February 1, 1984 to February 8, 1989, the ICC listened to evidence presented by the ICC Staff, Illinois Power Company, Inc., Citizens Utility Board, the Governor's Office of Consumer Services, the Office of Public Counsel and various experts retained to audit construction at Clinton. On March 30, 1989, the ICC issued its order in docket numbers 84-0055, 87-0695 and 88-0256. This order summarized the evidence and made a specific finding that $712 million of cost overruns were due to mismanagement or negligence. (ICC Order, docket numbers 84-0055, 87-0695, 88-0256, p. 118).

Pursuant to *Nordine v. Illinois Power Company*, 32 Ill. 2d 421, 206 N.E.2d 709 (1965), reviewing courts have the power to judicially notice orders of the ICC at any time, even if notice was not taken by the trial court. For convenience of the Illinois appellate court, plaintiffs filed a Motion for Leave to File Appendix to Petition for Rehearing . . . citing *Nordine* and other authority. Despite the fact that the ICC order was not issued until after oral argument, the motion was denied. (Appendix C and D)

The ICC also determined that there was no need for additional power in Illinois at the outset of the Clinton project and that less than thirty percent (30%) of the output of Clinton *would ever be needed.* (ICC Order, docket numbers 84-0055, 87-0695, 88-0256, p. 151) This confirms Plaintiffs' position that there is no reason to pay inflated construction costs to obtain power from Clinton. The ICC finding also contradicts the Illinois court's opinion that continuing to exclusively purchase electric power from Illinois Power was a "benefit" to the co-ops.

> In May 1986, a separate legal committee was set up to evaluate the advisability of proceeding in the derivative action. Concern was voiced by this committee relating to *the possibility of loss of all power benefits from IP.*
>
> * * *
>
> The long-term source of power must be considered with the present and future projected costs of electrical energy from both the Clinton nuclear source and fossil-fuel sources.
>
> App. 14-15 (emphasis added).

The issue of "real" versus "nominal" interest has been examined repeatedly by this Court. In a derivative action, the nominal defendant corporation can normally be realigned as plaintiff since the action is pursued in the

corporate interest. However, that is never the case where corporate management has expressed antagonism to the claim presented by the plaintiff shareholders. (*Smith v. Sperling*, 354 U.S. 97, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957); *Doctor v. Harrington*, 196 U.S. 579, 25 S.Ct. 355, 49 L.Ed. 606 (1905).

CONCLUSION

"Realignment" is a misnomer in this case. Realignment is an issue distinct from the right to participate in a dispute that will determine constitutionally protected property rights. Parties with opposing interests should be aligned on opposite sides, not the same side. Encouraging "collusion" destroys our adversary system and thereby violates due process.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[Filed March 17, 1989]

No. 4-88-0355

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

LEWIS POWELL, individually and as member of Menard Electric Cooperative; JOHN B. HENRY, individually and as member of Spoon River Electric Cooperative; TERRY POST, individually and as member of Adams Electric Cooperative; DR. GENE SHULTZ, individually and as member of MJM Electric Cooperative; RUBY WATRET, individually and as member of Illinois Rural Electric Cooperative; FRANCIS F. WHITE, individually and as member of Rural Electric Convenience Cooperative; JOHN R. GLIDDEN, individually and as member of Western Illinois Electric Cooperative, said cooperatives being members of Western Illinois Power Co., Inc.; and DAVID COLLINS, individually and as member of Coles-Moultrie Electric Cooperative; KEN BAEBLER, individually and as member of Monroe County Electric Cooperative; TOM DEWITT, individually and as member of Edgar Electric Cooperative; LEO GOGOLEK, individually and as member of Tri-County Electric Cooperative; CHARLES GOODALL, individually and as member of Illini Electric Cooperative; GLEN KRIDER, individually and as member of Southwestern Electric Cooperative; R.O. JEWELL, individually and as member of Illinois Valley Electric Cooperative; JEFFREY R. KINCAID, individually and as member of Farmers Mutual Electric Company; EBEN IRISH, individually and as member of McDonough Power Cooperative; MAURICE MOORLEGHEN, individually and as member of Clinton County Electric Co-

operative; MRS. DALE SNYDER, individually and as member of Clay Electric Cooperative; TOM SUMMERS, individually and as member of Shelby Electric Cooperative; GLELA SHARP, individually and as member of Eastern Illinois Power Cooperative; DEANE WEIHMEIR, individually and as member of Corn Belt Electric Cooperative; LOUIS ZURLIENE, individually and as member of Wayne-White County Electric Cooperative, said cooperatives being members of Soyland Power Cooperatives, Inc.; and LEWIS POWELL, JOHN B. HENRY, TERRY POST, DR. GENE SHULTZ, RUBY WATRET, FRANCIS F. WHITE, JOHN R. GLIDDEN, DAVID COLLINS, KEN BAEBLER, TOM DEWITT, LEO GOGOLEK, CHARLES GOODALL, GLEN KRIDER, R.O. JEWELL, JEFFREY R. KINCAID, EBEN IRISH, MAURICE MOORLEGHEN, MRS. DALE SNYDER, TOM SUMMERS, GLELA SHARP, DEANE WEIHMEIR, LOUIS ZURLIENE, as Representatives of a Class of All Customers of Illinois Power Company, Inc., who are obligated to Pay Rates Charged Through the Clinton Nuclear Station,

Plaintiffs-Appellants,

v.

WESTERN ILLINOIS ELECTRIC COOPERATIVE, ADAMS ELECTRIC COOPERATIVE, SPOON RIVER ELECTRIC COOPERATIVE, MENARD ELECTRIC COOPERATIVE, ILLINOIS RURAL ELECTRIC COOPERATIVE, MJM ELECTRIC COOPERATIVE, RURAL ELECTRIC CONVENIENCE COOPERATIVE, CLAY ELECTRIC COOPERATIVE, CLINTON COUNTY ELECTRIC COOPERATIVE, COLES-MOULTRIE ELECTRIC COOPERATIVE, CORN BELT ELECTRIC COOPERATIVE, EASTERN ILLINOIS POWER COOPERATIVE; EDGAR ELECTRIC COOPERATIVE, FARMERS MUTUAL ELECTRIC COMPANY, ILLINI ELECTRIC COOPERATIVE, ILLINOIS VALLEY ELECTRIC COOPERATIVE, McDONOUGH POWER COOPERATIVE, MONROE COUNTY ELECTRIC COOPERATIVE, SHELBY ELECTRIC COOPERATIVE, SOUTHWESTERN ELECTRIC COOPERATIVE, TRI-COUNTY ELECTRIC CO-

OPERATIVE, WAYNE-WHITE COUNTY ELECTRIC COOPERATIVE, WESTERN ILLINOIS POWER COOPERATIVE, INC., and SOYLAND POWER COOPERATIVE, INC.,

Defendants-Appellees,

and

ILLINOIS POWER COMPANY, INC., an Illinois Corporation,

Defendant.

Appeal from Circuit Court, County of Sangamon, No. 86L373.
Honorable Simon L. Friedman, Judge Presiding.

JUSTICE LUND delivered the opinion of the court:

On September 22, 1986, plaintiffs Lewis Powell and others filed a derivative action against nominal defendants Western Illinois Power Cooperative (WIPCO) and Soyland Power Cooperative, Inc. (Soyland), and real defendant Illinois Power Company, Inc. (IP). The derivative action resulted from the failure or delay of WIPCO and Soyland to bring action against IP for alleged wrongdoing by IP in the construction of the nuclear power plant near Clinton, Illinois (Clinton Nuclear Station). After various motions and pleading procedures, including an amended complaint by plaintiffs, on March 13, 1987, WIPCO and Soyland moved to be realigned as plaintiffs, and asked that the original plaintiffs be dismissed as to all of the derivative counts. Plaintiffs objected, contending their amended pleadings suggested a conflict of interest existed with WIPCO and Soyland directors preventing proper determination of litigation matters. The trial court ordered a good faith hearing, placing the burden on plaintiffs to establish the lack of good faith on the part of WIPCO and

Soyland's board of directors. On January 7, 1988, the trial court denied pending motions and found plaintiffs failed to establish that the present board of directors suffered from a conflict of interest or acted in bad faith. An order was entered realigning the derivative defendants as plaintiffs, and dismissing plaintiffs from the derivative action counts. This appeal followed.

From cases cited and from our additional research, it appears we are dealing with a case of first impression in the State of Illinois. Often, derivative actions are brought because of alleged specific wrongdoing by corporate management and directors. WIPCO and Soyland are cooperatives but, for purposes of this action, are treated as corporations.

Various rural electric cooperatives, serving rural Illinois, created WIPCO and Soyland for purposes of most economically obtaining electrical power supplies for the various distribution coops. The distribution coops do not and, for practical purposes, cannot produce the power they sell directly to their consumers.

The WIPCO and Soyland board of directors are elected by the directors of the various distribution coops. The directors of the distribution coops, in turn, are elected from the membership of their respective coops. The membership is composed of the coops' power consumers.

The present action evolved from a 1976 partnership agreement between WIPCO and Soyland on one hand and IP on the other. The initial agreement provided for IP to own 80% of the Clinton Nuclear Station, with Soyland owning 10.5%, and WIPCO owning 9.5%. The original estimated cost for the Clinton Nuclear Station was $400 million. The final cost, evidently, exceeded $4 billion. The overrun on cost brought WIPCO and Soyland to the brink

of bankruptcy. Many distribution coops were faced with unanticipated large rate increases.

In 1983 and 1984, as a result of the financial disaster facing WIPCO and Soyland, an agreement evolved between WIPCO and Soyland on one side and IP on the other, freezing the coops' required investments, reducing the coops' ownership interest, mutually releasing liability, and tolling the statute of limitations. In separate agreements, certain rights to IP fossil fuel electric energy sources were extended to the coops.

In December 1985, an independent audit by Touche-Ross alleged cost overruns exceeding $400 million at the Clinton Nuclear Station, due to IP mismanagement. The WIPCO and Soyland board started investigations into a possible legal action based upon mismanagement overruns. Plaintiffs had made many complaints about the IP transaction. The present action by plaintiffs resulted from nominal defendants delaying their actions against IP.

We, by our summary of the history, do not intend to downplay the complexity of all the facts surrounding this cause of action. Plaintiffs seek, as part of their requested relief, a rescission of the original partnership agreement and the voiding of the 1983 and 1984 agreements, especially those concerning mutual release liability.

Nominal defendants, together with their underlying member cooperatives, are faced with decisions concerning power sources, power costs, and the economic effect of winning or losing litigation with IP. These business decisions are far from simple and, possibly, beyond the actual ability of either plaintiffs or the management and directors of WIPCO and Soyland.

Legally, we begin by recognizing the principle that corporate decisions are the responsibility of the board of directors, and not subject to various shareholders' control. This is referred to as the business judgment rule, and extends to the management of matters of litigation. (*United Copper Securities Co. v. Amalgamated Copper Co.* (1917), 244 U.S. 261, 263, 61 L. Ed. 1119, 1124, 37 S. Ct. 509, 510.) There generally is a presumption that in making a business decision, the directors act on informed basis, in good faith, and in the honest belief that the action taken is in the best interest of the company. *Aronson v. Lewis* (Del. 1984), 473 A.2d 805.

Derivative actions exist when directors or officers commit wrongful acts detrimental to the corporation, and the corporation fails to bring a related legal action. (13 Wm. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* sec. 5941.1, at 18-22 (1984 rev. vol., perm. ed.).) These wrongful acts can include fraudulent conduct, breach of fiduciary duties, or the failure to bring suit against a third party. The nature of a derivative suit is twofold. It is a suit to compel the corporation to sue, and a suit by the corporation, asserted by the shareholder on its behalf, against those liable to it. *Kaufman v. Kansas Gas & Electric Co.* (D. Kan. 1986), 634 F. Supp. 1573, 1577; *Aronson*, 473 A.2d at 811.

Generally, a corporation can, due to the business judgment rule, step in and dismiss a derivative suit as being contrary to the corporation's best interest. (See *Abramowitz v. Posner* (2d Cir. 1982), 672 F.2d 1025.) However, this ability is restricted if it appears that the corporate management and directors are not acting independently and in good faith. See *Abramowitz*, 672 F.2d 1025; *Zapata Corp. v. Maldonado* (Del. 1981), 430 A.2d 779.

In the present case, the complaint alleges, as a basis for its suit, that nominal defendants have failed to proceed with the suit against IP. There are no allegations of any other wrongdoing by the corporate authorities. After the nominal defendants asked to be realigned, plaintiffs asked permission to file an amended complaint which named various officers and directors as defendants, and alleged they are personally liable to the corporations for their conduct. The court did not allow this amended information, and it is not now part of this action.

Thus, we are faced with the anomalous situation where plaintiffs have filed suit on behalf of the corporations against IP, alleging the management of the corporations refused to do so, but, now that the corporations wish to conduct the action on their own behalf, plaintiffs are resisting them.

Plaintiffs insist the court's decision was erroneous for several reasons. First, they believe the court should not have conducted the hearing on the good faith and independence of nominal defendants. Second, they maintain, if the hearing should have been conducted, the court mistakenly placed the burden of proof on them. Third, they allege that, if the first two steps were proper, then the court's ultimate decision was against the manifest weight of the evidence.

PROPRIETY OF EVIDENTIARY HEARING

Plaintiffs assert the court should not have conducted a hearing. They rely on a string of Federal cases which hold that in questions of party realignment, the court must look at the pleadings and the nature of the dispute to determine if the corporation is actually antagonistic to the shareholders' claim. (See *Liddy v. Urbanek* (11th Cir. 1983),

707 F.2d 1222, 1224; *Lewis v. Odell* (2d Cir. 1974), 503 F.2d 445, 447.) We do not find these cases persuasive since they are directed to questions of party alignment for purposes of Federal diversity jurisdiction.

Rather, we believe the analysis most persuasive to our situation is in those cases where the court allows the corporation to dismiss the derivative complaint over the wishes of the plaintiff shareholders (see *Abramowitz*, 672 F.2d 1025; *Zapata*, 430 A.2d 779), since the authority to ultimately dispose of the lawsuit is what is involved in the present case. In those cases, the court acknowledged the efficacy of the business judgment rule, and the importance of deferring to the corporate authorities in decisions involving corporate litigation. Accordingly, they determined a hearing should be held to determine the directors' good faith and independence in seeking termination of the suit. If that is established, then, due to the business judgment rule, the action would be dismissed.

Similarly, the Illinois courts recognize the strong preference to the decisions of the corporate boards:

> " 'The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. * * * And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors of the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs.' " (*Goldberg v. Ball* (1940), 305

Ill. App. 273, 282, 27 N.E.2d 575, 579, quoting *Corbus v. Alaska Treadwell Gold Mining Co.* (1903), 187 U.S. 455, 463, 47 L. Ed. 256, 259-60, 23 S. Ct. 157, 160.)

It would seem incongruous to recognize this important principle and then deny the corporate authorities the right to control a corporate cause of action based on the artful pleadings of the derivative complaint. We believe that, due to this presumption, a corporation should be able to be realigned and take over responsibility for its own cause of action, subject to a hearing on the good faith and independence of the board in reaching this determination.

WIPCO and Soyland contend the realignment should have been automatic and without the trial court hearing. In light of the allegations of conflict, and WIPCO and Soyland's delay in seeking realignment, we disagree and approve the trial court's hearing requirement. In so deciding, we are cognizant of the conflict with the general policy letting corporate directors make all of the business decisions.

BURDEN OF PROOF AT HEARING

Similarly, we find the court properly placed the burden on plaintiffs to prove the coops were not acting independently and in good faith in seeking to be realigned as plaintiffs. Plaintiffs insist this is incorrect, relying on *Zapata*, where the Delaware Supreme Court placed the burden on the corporate authorities.

However, a close reading of *Zapata*, which is further explained in *Abramowitz*, clarifies that the court was addressing two different situations. The first is where a demand to sue is not made on the corporation because it is deemed futile. This is generally due to improper con-

duct of members of the board of directors where the courts recognize it would be a useless task to ask the board to sue themselves. In this situation, if the board seeks to dismiss the action, the disinterested board members have the burden of proving their good faith. (*Abramowitz*, 672 F.2d at 1031.) This is not the situation with which we are faced.

The second circumstance involves those cases where a demand to sue a party has been made on the board, and they have refused to to do. In that situation, since the refusal to sue was presumably made by application of the board's business judgment, the shareholder has the burden at the hearing on the motion to dismiss to prove some wrongdoing on the behalf of the board in reaching that determination. (*Abramowitz*, 672 F.2d at 1031.) This is the factual setting before us, and we find this analysis persuasive.

As noted, the business judgment rule is grounded on the thesis that the corporate directors are, in good faith applying their best business judgment for the benefit of all. Accordingly, a decision to not sue or delay filing a suit should be given deference. There may exist a myriad of factors for the board making that determination. For example, in the present case, it is apparent the directors were attempting to balance concerns of costs and long-term power supply, as well as investigating a possible claim against one of its suppliers. In such a situation, the directors' decision is presumed proper, and the burden is properly placed on the shareholder plaintiffs to show that the directors are not now acting in good faith and independently in desiring to prosecute the lawsuit. An opposite result would unduly burden corporation management and directors, who have the responsibility for the business decisions of the corporation, from taking control of what are, in fact, the corporation's legal proceedings.

ATTORNEY-CLIENT PRIVILEGE ISSUE

Prior to determining the question of sufficiency of evidence, we consider the plaintiffs' argument that the trial court improperly found an attorney-client privilege existed, limiting certain discovery from the board of directors' minutes of both WIPCO and Soyland.

Plaintiffs were supplied with redacted copies of defendants' board meeting minutes. Plaintiffs attempted to elicit testimony concerning the redacted discussions between attorney John Ward and defendants' board. Defendants asserted the privilege, alleging they did not want the representatives of IP, present in the courtroom, to receive the information. The court upheld the privilege.

The attorney-client privilege exists in order that one who is, or seeks to become, a client may consult freely with counsel, without fear of compelled disclosure of information communicated by him to the attorney whom he has employed, or seeks to employ. (*People v. Adam* (1972), 51 Ill. 2d 46, 48, 280 N.E.2d 205, 207, *cert. denied* (1972), 409 U.S. 948, 34 L. Ed. 2d 218, 93 S. Ct. 289.) The privilege is created and continues to exist where legal advice of any kind is sought from a professional legal advisor in his capacity as such, at which time the communications relating to that purpose, which are made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor, except when the privilege is waived. (*Adam*, 51 Ill. 2d at 48, 280 N.E.2d at 207.) This privilege also applies to discussions between a legal advisor and the control group of a corporation. (*Consolidated Coal Co. v. Bucyrus-Erie Co.* (1982), 89 Ill. 2d 103, 118, 432 N.E.2d 250, 257.) In the present case, it is evident defendants are such a control group and, absent any exceptions, the general rule should apply.

John Ward testified he is an attorney, licensed and practicing in Iowa. He is not licensed in Illinois State courts, but is licensed in the Federal courts. Since 1983, he has provided services to Soyland. In response to questioning about the redacted portion of-the March 1984 minutes, defendants asserted their privilege. The court reviewed an unredacted copy of the minutes and, finding that legal advice was involved, upheld defendants' assertion.

Plaintiffs observe that Ward admits he is not licensed to practice in Illinois. They argue the purpose of the privilege is to protect the attorney-client relationship. Since Ward cannot be considered an attorney in Illinois, then there is no relationship to protect.

It is clear Ward is not licensed in Illinois. However, this appears to have little to do with the efficacy and application of the privilege. The purpose of the privilege is to facilitate a dialogue between a legal advisor and a client to allow for advice and an exchange of information without fear of this discussion being subject to compelled disclosure. The key appears to be not whether an attorney is licensed in Illinois, but whether a protected relationship has developed between a professional legal advisor and a client.

The above analyses seems particularly appropriate in view of the fact the practice of law is becoming increasingly specialized and technical. It is, therefore, necessary for corporate boards to seek out counsel from those attorneys having developed the requisite expertise. To hold that the communications between these parties has somehow lost its privileged character because counsel is not licensed in the present jurisdiction makes little sense. In fact, in the Federal courts, the privilege is available as long as counsel is "a member of the bar of *a* court" (em-

phasis added) (*United States v. United Shoe Machinery Corp.* (D. Mass. 1950), 89 F. Supp. 357, 358), and has been applied even though counsel was not licensed in the respective jurisdiction. See *Paper Converting Machine Co. v. FMC Corp.* (E.D. Wis. 1963), 215 F. Supp. 249; *Georgia-Pacific Plywood Co. v. United States Plywood Corp.* (S.D. N.Y. 1956), 18 F.R.D. 463; *Zenith Radio Corp. v. Radio Corp. of America* (D. Del. 1954), 121 F. Supp. 792.

Plaintiffs next contend that this court should adopt a good-cause exception to the privilege in shareholder derivative lawsuits. They rely on the case of *Garner v. Wolfinbarger* (5th Cir. 1970), 430 F.2d 1093, *cert. denied* (1971), 401 U.S. 974, 28 L. Ed. 2d 323, 91 S. Ct. 1191.

The *Garner* opinion might seem applicable to the present case and the hearing held by the trial court. However, the present action is not against the officers and directors, as in *Garner*, and this would, normally, justify a decision contrary to *Garner*. In the trial court hearing, the issue related to the good-faith conduct of the directors in pursuing the action against IP. The litigated relationship appears similar to the facts in *Garner*, with an important exception—the disclosure of information sought could have a detrimental effect on the cooperatives in their litigation with IP. IP was present by counsel and is the principal party defendant in the derivative action.

We conclude the trial court acted properly in holding the attorney-client relationship existed. Further, we have gone farther than the trial court and have examined the sealed documents containing the unredacted minutes, and conclude no information of value exists relating to determining the issue of good faith.

PROPRIETY OF TRIAL COURT'S DETERMINATION

We have considered the evidence before the trial court. The record indicates the substantial problems which confronted both WIPCO and Soyland in obtaining power sources. In the 1980's Soyland cancelled construction that had already begun on a coal generation plant located in Pike County. Availability of government financing became questionable when a $900 million projected cost was determined. Negotiations for long-term power sources, in addition to the Clinton Nuclear Station, were sought from several sources. Separate contracts with IP, relating to energy from fossil-fuel plants, were delayed because of hearings before the Federal Energy Regulatory Commission. Negotiations for long-term contracts with Central Illinois Public Service Company appeared to be proceeding over a lengthy period of time and causing great concern.

During all this time, the escalating costs of the Clinton Nuclear Station, together with the settlement of claims because of cancellation or delay of the Pike County construction, placed both WIPCO and Soyland on the verge of bankruptcy. Congressional action was eventually needed and obtained to enable satisfactory refunding of debt payments to the United States Government.

Negotiations with IP resulted in a limit on the investment in the Clinton Nuclear Station. The coop minutes over the several-year period indicated the great concern over power costs. Board members changed, as did management personnel. Opinions of board members in how to proceed differed. In May 1986, a separate legal committee was set up to evaluate the advisability of proceeding in the derivative action. Concern was voiced by this committee relating to the possibility of loss of all power bene-

fits from IP. In December 1986, a consulting firm was retained to advise WIPCO and Soyland as to advisability of seeking action against IP relating to the Clinton Nuclear Station construction mismanagement.

We are mindful of the various transactions between WIPCO and Soyland on one hand and IP on the other, but we conclude the trial court's decision allowing the cooperatives to be realigned as plaintiffs and dismissing the initial plaintiffs was not against the manifest weight of the evidence.

The substantial record in this case further indicates the complexities which exist. It is obvious that consideration must be given to interests other than just recovering a portion of an unnecessary $400 million overrun or a billion dollar overrun. The long-term source of power must be considered with the present and future projected costs of electrical energy from both the Clinton nuclear source and fossil-fuel sources. Decisions concerning these matters are those of the board of directors.

Because of our decision, we find issues relating to preliminary injunctions to be moot.

Affirmed.

McCULLOUGH, P.D., and KNECHT, J., concur.

APPENDIX B

[Filed September 27, 1988]

No. 4-88-0355

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

LEWIS POWELL, et al.,

Plaintiffs-Appellants,

v.

WESTERN ILLINOIS ELECTRIC COOPERATIVE, et al.,

Defendants-Appellees.

Appeal from Circuit Court,
County of Sangamon, No. 86L373

ORDER

This cause comes for consideration upon a motion to supplement the record on appeal with all discovery materials submitted to the trial court which are, at present, sealed by order of the trial court. Upon consideration, the motion is ALLOWED and the clerk of the circuit court of Sangamon County is directed to supplement the record on appeal with all sealed materials now in the possession of the trial judge. The court further directs that these materials shall continue to remain sealed until further order of the court. See *People v. Jenkins* (1975), 30 Ill. App. 3d 1034, 333 N.E.2d 497; *People v. Stevens* (1981), 102 Ill. App. 3d 773, 430 N.E.2d 331.

Appellants have also filed a motion for extension of time to file the brief on the basis these sealed records must be examined by counsel for the appellants. Given the rationale expressed in *Jenkins* and *Stevens* the request for extension of time is DENIED.

ENTERED: September 27, 1988

By order of the Court
consisting of the panel of

HONORABLE FREDERICK S. GREEN
HONORABLE JOHN T. McCULLOUGH
HONORABLE CARL A. LUND

APPENDIX C

[Filed April 14, 1989]

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

Powell, et al.

Plaintiff-Appellants

vs.

Western Illinois Electric Cooperative, et al.

Defendant-Appellees

Appeal from Circuit Court, County of Sangamon
No. 86-L-373
Honorable Simon L. Friedman, Presiding

MOTION FOR LEAVE TO FILE APPENDIX TO PETITION FOR REHEARING IN EXCESS OF PAGE LIMITATION

COMES NOW, the Plaintiff-Appellants, POWELL, ET AL. by and through their attorney, LONDRIGAN, POTTER & RANDLE, P.C. and pursuant to *Ill.Rev.Stat.* Ch. 110A, §367 moves this Court for leave to file an Appendix to their Petition for Rehearing in excess of the page limitation and in support thereof state as follows:

1. On March 17, 1989, this Court filed its opinion in this case. This opinion affirmed the trial court's orders.

2. On April 7, 1989, Plaintiff-Appellants filed their Petition for Rehearing.

3. As a part of said Petition, Plaintiff-Appellants requested the Court to take judicial notice of two items of public record (a) the Order of the Illinois Commerce Commission dated March 30, 1989 entered in the Illinois Power Company rate case, (b) the Answer, Affirmative Defenses and Counterclaim filed against Defendant-Appellees in the trial court. Plaintiff-Appellants cited *Nardine v. Illinois Power Company*, 32 Ill.2d 421 and *Ill.Rev.Stat.* Ch. 110, ¶8-1002 in support of that request.

4. As a convenience to this Court, the Plaintiff-Appellants included the above items in an Appendix to their Petition for Rehearing. However, as this Appendix exceeded twenty-seven (27) pages in length, the clerk of the Appellate Court refused to accept this Appendix for filing.

5. As set forth fully in the Petition for Rehearing the documents in said Appendix are relevant and material to the appeal at bar and should be judicially noticed by this Court.

WHEREFORE, Plaintiff-Appellant, POWELL, ET AL. pray this Court grant them leave to file the Appendix to their Petition for Rehearing. A copy of said Appendix is attached hereto.

By: /s/ GORDON W. GATES
One of Plaintiff-Appellants
Attorneys

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APPENDIX D

(Letterhead Of)

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

DATE: April 17, 1989

RE: Powell v. Western Illinois Electric Cooperative et al.
General No. 4-88-0355

TO COUNSEL:

Appellants' motion for leave to file appendix to petition for rehearing DENIED.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:iv

TO:

Attorney Gordon W. Gates and
Attorney Thomas F. Londrigan
Attorney James C. Craven
Attorney Ed Cunningham
Attorney Thomas Wack and
Attorney Deborah Bell Yates and
Attorney Peter W. Herzog
Attorney Joseph Lundy

APPENDIX E

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 5, 1989

Mr. Thomas F. Londrigan
Londrigan, Potter & Randle
P. O. Box 399
Springfield, IL 62705

No. 68670—Lewis Powell, Indv., etc., et al., petitioners, v. Western Illinois Electric Cooperative, et al., etc., respondents. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

Miller, J., took no part.

The mandate of this Court will issue to the Appellate Court on October 27, 1989.

APPENDIX F

ILLINOIS SUPREME COURT RULE 317

Appeals From The Appellate Court To The Supreme Court As Of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition in the form prescribed by Rule 315, except that the petition shall be entitled "Petition for Appeal as a Matter of Right", item (1) of the petition shall state that the appeal is taken as a matter of right, and item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right. In other respects the procedure is governed by Rule 315. If leave to appeal is to be sought in the alternative, the request therefor must be included in the same petition, and item (1) thereof shall include an alternative prayer for leave to appeal, and item (5) the argument as to why in the alternative leave to appeal should be allowed as a matter of sound judicial discretion. When both appeal as a matter of right and leave to appeal are sought, both requests will be disposed of by a single order. If the court allows the petition, briefs, and abstracts in cases in which they are required, shall be filed as provided in the case of appeal by leave under Rule 315.